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IN THE

Supreme Court of the United States

October Term, 1961

No. 913

LOUIS G. PFANNEBERG,

Petitioner,

vs.

WALTER BREAM, MAGLEY LAWSON, PAUL J. YOUNG, NANCY E. SMITH, DANIEL D. MERKSELL, as members of the Board of Supervisors of the County of San Bernardino, acting as and as the Air Pollution Control Board of the San Bernardino County Air Pollution Control District of the County of San Bernardino; DONALD S. C. ANDERSON, STEWART B. MASON, HERBERT S. BAILEY, FRANK DOWNEY, HUGO WILDERMUTH, as members of the Civil Service Commission of the County of San Bernardino; COUNTY OF SAN BERNARDINO, a municipal corporation,

Respondent.

Petition for Writ of Certiorari to the District Court of Appeal of the State of California, Fourth Appellate District.

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IN THE

Supreme Court of the United States

October Term, 1961

No. .....

EDWARD PRANGER,

Petitioner,

vs.

S. WESLEY BREAK, MAGDA LAWSON, PAUL J. YOUNG, NANCY E. SMITH, DANIEL D. MIKESELL, as members of the Board of Supervisors of the County of San Bernardino, acting *ex officio* as the Air Pollution Control Board of the Air Pollution Control District of the County of San Bernardino; DONALD S. C. ANDERSON, STEWART B. MASON, HERBERT S. BAILEY, FRANK DOWNEY, HUGO WILDE, as members of the Civil Service Commission of the County of San Bernardino; COUNTY OF SAN BERNARDINO, a municipal corporation,

Respondent.

Petition for Writ of Certiorari to the District Court of Appeal of the State of California, Fourth Appellate District.

Petitioner, Edward Pranger, respectfully prays for a Writ of Certiorari to the District Court of Appeal of the State of California, Fourth Appellate District, in order to review its judgment affirming a judgment of the Superior Court of the State of California, In and For the County of San Bernardino, denying the petitioner a Writ of Mandate.

Opinions Below.

1. The date of the judgment sought to be reviewed and the time of its entry is November 21, 1960.

2. A petition for hearing in the Supreme Court of the State of California was denied on January 18, 1961.

3. The statutory provisions believed to confer jurisdiction on this court to review the judgment in question by Writ of Certiorari are 28 U. S. C. 1257 (3) and Rule 19 (1)(a) and Rule 22(3) of this court.

The Record.

On or about February 9, 1961 petitioner filed with the District Court of Appeal, Fourth Appellate District a notice to prepare and certify the record for use before this honorable court on a petition for certiorari. On February 27, 1961 said court made its order pursuant to Rule 12(4) of the Revised Rules of the Supreme Court of the United States, transmitting the entire original record on appeal to the Clerk of the Supreme Court of the United States for inspection by said court. Copy of that order appears herein as Appendix B.

Questions Presented for Review.

1. Does the discharge by a municipal body of a public employee with Civil Service tenure, solely because the body objects to the philosophy expressed by the employee in an editorial in a union newspaper, deprive such employee of due process of law and equal protection of the law?

2. Is a public employee, who by Civil Service regulation is entitled to a hearing upon discharge, deprived

of due process of law by reason of the failure of the municipality to specify the particular wrongful act, if any, which it is claimed the employee committed?

3. Does the discharge by a municipal body of a public employee with Civil Service tenure solely because of the expression of an editorial opinion in a union newspaper advocating the abstract right to strike for public employees deprive such employee of due process of law and equal protection of the law?

Constitutional Provisions Involved.

1. Section 1 of the 14th Amendment of the United States Constitution provides in part:

> ". . .. nor shall any state deprive any person of . . . property . . . without due process of law."

2. The 14th Amendment of the United States Constitution provides in part that all persons shall be entitled to equal protection of the law.

Chronology of Events and Description of the Record.

On August 20, 1958, by letter addressed to petitioner he was notified that he was dismissed effective 5:00 p.m. Friday, August 29, 1958. On August 23, 1958, in accordance with the Civil Service Ordinance of the County of San Bernardino, petitioner answered the charges made against him and appealed to the Civil Service Commission.

On September 12, 1958, the appeal of Edward Pranger came before the Civil Service Commission, and, at petitioner's request, was continued to September 23, 1958. The transcript of that hearing, which was of-

fered in evidence in the Superior Court below, will be identified herein as "Civil Service Comm. Reporter's Transcript (1)" or "CSC R. Tr. (1)."

On December 10, 1958, the Civil Service Commission resumed hearings on the issues raised by petitioner's appeal. The transcript of those proceedings, offered below, will be identified herein as "Civil Service Comm. Reporter's Transcript (2)" or "CSC R. Tr. (2)". At the conclusion of the hearing, the Commission affirmed the dismissal of petitioner.

He commenced a proceeding in mandamus in the Superior Court to review this decision of the Civil Service Commission.

Respondents answered and the matter proceeded to trial. The cause was submitted upon the joint pretrial statement, pre-trial conference order, and the exhibits listed therein. No further evidence was received. Thereafter the trial court below determined the issues adversely to petitioner, and petitioner noticed an appeal. The Clerk's Transcript on Appeal will be identified herein as "Cl. Tr."

As the parties agreed, and the pretrial order indicates, respondents were the duly elected and acting members of the Board of Supervisors of San Bernardino County. Prior to the happening of the events herein, the Board of Supervisors had established an Air Pollution Control District pursuant to Sections 24198 to 24212, inclusive, of the Health & Safety Code, and the members of the Board of Supervisors were at all times acting as *ex officio* members of the Air Pollution Control Board of the Air Pollution Control District.

At all times there existed a system of Civil Service in the County of San Bernardino.

Prior to August 20, 1958, George R. Bean was the duly appointed and acting Air Pollution Control Officer, and petitioner was employed by the Air Pollution Control District as a Clerk IV and was paid therefor the sum of $327.00 per month [Cl. Tr. p. 31].

On August 19, 1958, S. Wesley Break, Chairman of the Board of Supervisors, wrote petitioner, notifying him that the Board had determined to, and had dismissed him [CSC R. Tr. (2), p. 10, line 24].

The following day the respondents met at 9:30 a.m., sitting as the Air Pollution Control Board, and apparently discharged petitioner again [CSC R. Tr. (2), p. 11, line 10].

Not satisfied, at 10:00 a.m. respondents met again this time as the Board of Supervisors and apparently once again discharged petitioner [CSC R. Tr. (2), p. 11, line 1].

This spate of official action of respondents was provoked by the obdurate refusal of the Air Pollution Control Officer, George Bean, to discharge petitioner. Bean had met with the Board on August 19. At that time respondent Break told Bean that if Bean did not discharge petitioner, the Board would [SC R. Tr. p. 5, line 2].

A second meeting was held on the afternoon of the 19th between Bean and all members of the Board. At that meeting Break said, "You will not fire Mr. Pranger, will you?" Bean steadfastly replied, "No, I refuse to fire Mr. Pranger." [SC R. Tr. p. 6, line 16.]

On August 20, the Board met again and Mr. Bean was again present. Once again he was asked to discharge Mr. Pranger, and once again he refused. Mrs. Morris, a Deputy County Counsel, was also present on this occasion. Some question was raised by Mrs. Morris as to the propriety of the action which had been taken thus far to dismiss appellant [SC R. Tr. p. 7, line 12].

Mr. Break then said to Mr. Bean, "Will you under our orders write the letter of dismissal?" [SC R. Tr. p. 14, line 15]. Bean said that he would, under orders [SC R. Tr. p. 15, line 14].

Bean reiterated, on the 19th he refused to dismiss. On the 20th he again refused to dismiss [SC R. Tr. p. 16, line 15]. Then, because the Board insisted on discharging petitioner, Bean resigned as Air Pollution Control Officer [SC R. Tr. p. 18, line 7].

Statement of Fact.

Prior to his dismissal petitioner as a permanent employee of the County of San Bernardino enjoyed Civil Service tenure. He could not be discharged except by an order in writing stating specifically the reasons therefor. He was entitled to reply in writing to said order within ten days from the date of its filing and demand a hearing before the Civil Service Commission. The petitioner was entitled to appear personally, produce evidence and to have counsel and a public hearing [Sec. 11, Ordinance No. 580, p. 16, Cl. Tr. on Appeal]. On August 20, 1958 such an order of termination purporting to be in compliance with Ordinance 580 was served upon your petitioner. The order is

set forth herein full and at length, and appears at page 20 of the Clerk's Transcript on Appeal.

"AIR POLLUTION CONTROL DISTRICT
SAN BERNARDINO COUNTY

172 West Court Street
San Bernardino, California

August 20, 1958

Mr. Edward Pranger
Air Pollution Control Office
San Bernardino County
San Bernardino, California

"Dear Mr. Pranger:

"Upon direction of the Board of the Air Pollution Control District I have been ordered to notify you of your dismissal from your Clerk IV position in the Air Pollution Control District, and do hereby notify you of your dismissal, effective 5:00 p.m., Friday, August 29, 1958.

"This action, pursuant to Section 11 of Civil Service Ordinance 805, is based upon conduct unbecoming an employee as exemplified by your actions at a Rialto City Council meeting and your editorial comments in the August, 1958 issue of the San Bernardino County Union Employee newsletter.

"The specific charges are that the philosophy expressed in the above-mentioned editorial is inimical to public service, and that you used abusive language with respect to Mr. Marvin Gray and

reporter Mary Lawrence at the Rialto City Council meeting.

"You are also informed that under Civil Service Ordinance 805 you have five days to file a request for an appeal and ten days to file an answer to these charges.

Very truly yours,

GEORGE R. BEAN,
Air Pollution Control Officer

GRB:fm

cc: Civil Service Commission
Board of Supervisors"

The order of discharge refers to the opinions expressed by petitioner in a newspaper editorial contained in the August, 1958 issue of the San Bernardino County Union Employee Newsletter.

That editorial read as follows:

EDITORIAL

"Newspaper headlines continue to blare out the fact that the cost of living is rising. They also bleat out the assurance that employees in private industry have received increased wages to meet this cost of decent American survival.

"They need not do it as a means of advertisement. We in the San Bernardino County employ are keenly aware of it without the necessity of reading about it. When the monthly accounting time inevitably rolls around, we know that we are orphans in a spiralling economic tornado.

"Are we in the San Bernardino County employ some sort of weird exception to recognized standards of decent living in our locale? Do we 'weirdies' purchase our subsistence from a special cutrate supermarket? Do we 'weirdies' pay our utility bills at a special discount? Is there a special free market for us to pay our rental, purchase our transportation, clothing and sundry necessities of life?

"The answer is an emphatic, 'No'. We are fish swimming in the same economic sea as dwells the entire Southern California populace. With one exception. The majority of us have been relegated, through the Board's indifference, to play the role of *bottom fish.*

"For the first budgetary time in recent years, our Board of Supervisors has lent a deaf ear to the economic facts of life when it comes to the need of the employees who administer the government they supposedly supervise. Our Union has appealed to them with supplication, mild agitation, and arbitration in an effort to nudge them from their 'ostrichized' head-in-the-sand attitude of 'hold the line'—to no avail.

"Is there an immediate, or even long range remedy to this situation? Perhaps, but the medicine is bitter. It calls for varied applications of lawsuit, slowdown, sitdown, walkout—or that final, bitter dose—the strike. Whatever antidote is prescribed, it can only be attained through the media of strong Unionism."

Upon the conclusion of the hearing the Civil Service Commission made its findings and order [Cl. Tr. on Appeal, p. 21], which reads as follows:

"This appeal having regularly and duly come before this Commission for hearing, and the above named Appellant having appeared by Counsel and having presented evidence, and the appeal having been submitted to this Commisison for decision upon the evidence, and this Commission (Commissioner Stewart Mason not participating) having considered this evidence, the Commission unanimously finds that the dismissal of Edward Pranger was legal in that it was the intent of the Air Pollution Control Board to dismiss Edward Pranger. and the order dismissing him was transmitted through the Air Pollution Control Officer over his signature.

"The Commission further finds, with reference to the charges filed against Appellant and dated August 20, 1958, that Edward Pranger is guilty, as charged, of conduct unbecoming an employee, as exemplified by his editorial comments in the August, 1958 issue of the San Bernardino County Union Employee Newsletter.

"The Commission having found Appellant guilty of the charges filed, further finds that such acts of the Appellant constitute cause for dismissal pursuant to the Rules of the Civil Service Commission

of the County of San Bernardino. It is the considered opinion of this Commission that Mr. Pranger demonstrated a lack of the essential loyalty, mature judgment, and the proper spirit of cooperation so vital to good government in this County.

NOW THEREFORE, IT IS HEREBY ORDERED that dismissal be and the same is hereby affirmed.

Dated: December 30, 1958.

CIVIL SERVICE COMMISSION OF SAN BERNARDINO COUNTY, CALIFORNIA

Donald S. C. Anderson

Donald S. C. Anderson, Chairman"

Apparently the Commission found in favor of your petitioner insofar as the Rialto City Council incident described in the order of discharge is concerned in view of its failure to make findings thereon, and limited its entire basis for the discharge of your petitioner to the editorial comments in the union newspaper.

ARGUMENT.

I.

The Expressed Reason for the Discharge of Your Petitioner Because of the Philosophy Contained in His Expression of Opinion Deprives Petitioner of Due Process of Law and Equal Protection of the Law.

An examination of both the order of discharge and the Findings and Order of the Civil Service Commission make it crystal clear that petitioner was deprived of his employment because of his beliefs rather than because of any act, action or inducement to action.

His employer discharged him because "the philosophy expressed in the above mentioned editorial is inimical to public service" and the Civil Service Commission affirmed this discharge, making as a specific finding that petitioner was guilty of conduct unbecoming an employee "as exemplified by his editorial comments in the August, 1958 issue of the San Bernardino County Union Employee Newsletter".

If this discharge and the affirmance of this discharge deprived petitioner of a property right, it is subject to constitutional attack. This honorable court has heretofore said: "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." *Wieman v. Updegraff*, 344 U. S. 183, 97 L. Ed. 216.

It is difficult to find in the reported cases of our courts as rank and deliberate an act of censorship as

exists in the instant case. That petitioner has been deprived of free speech is clear. Does the record indicate such a set of circumstances as would warrant such a deprivation?

What we have here is not a restriction upon the exercise of free speech but its absolute and complete abolition. Free speech may be absolutely prohibited only under the most pressing types of emergencies. Those emergencies must be of the kind that justify the suspension of the writ of habeas corpus or the suppression of the right of trial by jury. (*Milk Wagon Drivers Union v. Meadowmoor Dairies,* 312 U. S. 287, 320.) As this court has cogently noted, the greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force or violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government. (*DeJonge v. Oregon,* 299 U. S. 353.)

> "The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government. The judgment of the legislature is not unfettered. The limitation upon individual liberty must have appropriate relation

> to the safety of the state. Legislation which goes beyond this need violates the principle of the Constitution. If, therefore, a state statute penalizes innocent participation in a meeting held with an innocent purpose merely because the meeting was held under the auspices of an organization membership in which, or the advocacy of whose principles, is also denounced as criminal, the law, so construed and applied, goes beyond the power to restrict abuses of freedom of speech and arbitrarily denies that freedom. And, where a statute is so vague and uncertain as to make criminal an utterance or an act which may be innocently said or done with no intent to induce resort to violence or on the other hand may be said or done with a purpose violently to subvert government, a conviction under such a law cannot be sustained."
>
> *Herndon v. Lowery,* 301 U. S. 242.

To the same effect, see *Winters v. New York,* 333 U. S. 507; *Board of Education v. Barnette,* 319 U. S. 624.

In each of these cases wherein the right of free speech was defended and reiterated, there was evidence of some incitement to either action or to discussion which might lead to action. Here, however, we do not have the I. W. W. organizer making a speech in a southern mill town or a communist organizer shouting at a street corner in an Oregon timber town, or a radical agitator standing on a park bench in a New York park.

We have a civil servant protesting in muted terms against the unfair treatment which he felt was being

imposed upon public employees. For this he was summarily discharged.

It requires little imagination to guess the effect that this discharge had upon petitioner's fellow employees. It requires little imagination to guess that thereafter the employees of the County of San Bernardino would docilely accept whatever treatment was given them without murmur or protest.

As Professor Zechariah Chafee, Jr. noted in his work on *Free Speech in the United States:*

> "The effect of suppression extends far beyond the agitators actually put in jail, far beyond the pamphlets physically destroyed. A favorite argument against free speech is that the men who are thus conspicuously silenced had little to say that was worth hearing. Concede for the moment that the public would suffer no serious loss if every communist leaflet were burned or if some prominent pacifist were imprisoned, as perhaps might be under the loose language of the unprecedented federal sedition law passed last year, for discouraging drafted men by talk about plowing every fourth boy under. Even so, my contention is that the pertinacious orators and writers who get hauled up are merely extremist spokesmen for a mass of more thoughtful and more retiring men and women, who share in varying degrees the same critical attitude toward prevailing policies and institutions. When you put the hotheads in jail, these cooler people do not get arrested—they just keep quiet. And so we lose things they could tell us, which would be very advantageous for the future course of the

nation. Once the prosecutions begin, then the hush-hush begins too. Discussion becomes one-sided and artificial. Questions that need to be threshed out do not get threshed out."

Free Speech in the United States, Zechariah Chafee, Jr., p. 561.

In recent years the tendency has been to relegate public employees to a form of second class citizenship. The *Hatch Act,* and similar types of state legislation, while originally designed to protect the public employee from political pressure, have been warped into a form of repressive statute. From time to time, *Ex parte Curtis,* 106 U. S. 371, has been cited for the proposition that public employees may be required to give up their constitutional right to free speech in exchange for their public employment. That this is not so is patent from the statute and its history and from a reading of the Constitution of the United States. The clearest statement of the right of public employees to enjoy their Constitutional privileges appears in a massive opinion by the Supreme Court of the State of Virginia.

"It is admitted also that Carter M. Louthan is a citizen of Virginia, and that he has never in any wise abused this inestimable privilege guaranteed to all her citizens by the state in her organic law. It is admitted that the said plaintiff in error has committed no excess in the exercise of his rights of citizenship, it is only alleged that he did *peaceably assemble* together with his fellow-citizens, and did advocate a certain set of electors for president and vice-president of the United States at the coming election in November next. For this he has

been indicted by a grand jury in the City of Richmond, tried for it and convicted, and sentenced to be punished. Now why may not Carter M. Louthan do these acts, in themselves so harmless, and under the supreme law of this land so entirely lawful? We have already seen the act in question which has declared the exercise of these constitutional rights a crime. What is it that makes the exercise of these rights of the citizen by this citizen a crime? Because he has been appointed to and holds the office of county superintendent of schools in the County of Clarke. It is concluded by the commonwealth that because he is the incumbent of this office, the legislature, in the exercise of its general powers, may impose upon him such conditions, such restrictions as to it may seem for the public good. The learned attorney general has presented before this court the case on the side of the prosecution; and he contends first, that the plaintiff in error being an officer appointed by the state board of education does not come within the provisions of the constitution already recited; in other words, that being an officer, he is not a citizen within the contemplation of the constitution; that the legislature has the right to exclude the officers of the state government from incompatible pursuits; that the legislature felt that the active participation in politics by school officials was an evil that should be restrained; and contends that the legislature has the power to make all needful laws and regulations to carry into effect the public free school system provided for by the constitution; citing the case of *Ex parte Curtis,* 106 U. S. Reports (16 Otto), 371.

"In that case the Supreme Court of the United States, in construing the act of Congress prohibiting the employees of the government, under penalty, from giving or receiving moneys for political purposes, held that act not to be unconstitutional. The act of congress under consideration in that case, provides 'that all executive officers or employees of the United States, not appointed by the president with the advice and consent of the senate, are prohibited from requesting, giving to, or receiving from any other officer or employee of the government any money or property, or other thing of value, for political purposes, and any such officer or employee who shall offend against the provisions of this section shall be at once discharged from the service of the United States, and he shall also be deemed guilty of a misdemeanor, and, on conviction thereof, shall be fined in a sum not exceeding five hundred dollars.' Mr. Chief-Justice Waite, delivering the opinion of a majority of the court, said: 'The act is not one to prohibit all contributions of money or property by the designated officers and employees of the United States for political purposes, neither does it prohibit them altogether from receiving or soliciting money or property for such purposes. It simply forbids their receiving from or giving to each other. *Beyond this no restrictions are placed* on any of their political privileges.' That the evident purpose of congress in such enactments was to promote efficiency and integrity in the discharge of official duties, and to maintain proper discipline in the public service; that those in office can contribute as liberally

as they please, provided their payments are not made to any of the prohibited officers or employees.

"That being so, that is the political privileges of these officers and employees being unimpaired, the court held the act in question constitutional. It is clear from the opinion of the court in this case, that if the act in question had debarred the persons included therein from any political privilege, that the court would have regarded it as a different question altogether. But the chief-justice does not leave this matter to conjecture, but proceeds to show, in a strong light, that the act in question was, in effect, an act to preserve and to protect the political privileges of the persons included in its provisions; that the effect of the act was to prevent oppression, and to leave the employees of the government free to contribute or not to contribute, according to their own uncontrolled desire, to any political party, or to no political party, as a free inclination might suggest or dictate; and to protect such persons from being compelled to contribute their money in a manner contrary to their own wishes and sympathy.

"He says: 'A feeling of independence under the law, conduces to faithful public service, and nothing tends more to take away this feeling than a dread of dismissal. If contributions from those in public employment may be solicited by others in official authority, it is easy to see that what begins as a request may end as a demand, and that a failure to meet the demand may be treated by those having the power of removal as a breach of some

supposed duty growing out of the political relations of the parties. Contributions secured under such circumstances will quite as likely be made to avoid the consequences of the personal displeasure of a superior, *as to promote the political views of the contributor—to avoid a discharge from service, not to exercise a political privilege.*' The law contemplates *no restrictions* upon either giving or receiving. EXCEPT SO FAR AS MAY BE NECESSARY TO PROTECT IN SOME DEGREE THOSE IN THE PUBLIC SERVICE AGAINST EXACTIONS THROUGH FEAR OF PERSONAL LOSS;' referring to the act of February 1st, 1870, chapter 63, Rev. Stat. 1784, 'To protect officials in public employ.'

"The court says further: *'No one can, for a moment, doubt* that in both these statutes the object was to protect the classes of officials and employees provided for from being compelled to make contributions for such purposes through fear of dismissal, if they refused.' And that, 'political parties must almost necessarily exist under a republican form of government, and when public employment depends to any considerable extent on party success, those in office will naturally be desirous of keeping the party to which they belong in power. The statute we are now considering does not interfere with this.'

"This is the case of *Ex parte Curtis,* and we have thus fully recited and considered it, because it is appealed to by the learned attorney-general to uphold the act of the legislature in this case, which as we have seen, forbids certain citizens and offi-

cers of the state government from taking part in political meetings and speaking their sentiments on political questions freely according to their own untrammeled desire.

"The supreme court of the United States declared the act of congress constitutional because it did not destroy but protected the political privileges of these employees of the government, and guaranteed to them the right as freely as all others in the country, to act on political questions according to their own desire, and support without control, and without let or hindrance, the political party which they preferred.

"We cannot read that case and regard it as giving countenance to congress, or to any other legislative body, to seal the lips of citizens, and exclude them from the assemblies of the people, unless they will sit dumb among their fellow men, and to forbid their holding communion with their fellow-citizens on governmental questions, to directly or indirectly influence the votes of others.

"We think we can justly and fairly appeal to that decision of our supreme judicial tribunal as sustaining the view we have taken of this case.

"There may have been a time in the history of our country when the nature of the government was less understood and less clearly defined, when this might have been an open and debatable question; but we cannot now so regard it.

"In the early days of the republic, ambitious and despotic rulers, seeking to perpetuate their power or to aggrandize their stations, and finding

no express prohibition in the organic law, passed laws placing restraints upon the political privileges of the people; and in 1798 passed the sedition act, which trammeled freedom of speech, and imposed penalties upon the free discussion of political questions. This brought on a conflict between the people and their rulers, which culminated in a change of rulers, and in the constitutional provisions, both federal and state, which we have recited above, which guaranteed to the citizens of the United States and of the state of Virginia freedom of speech, and the right to peacefully assemble, to freely speak and freely write their sentiments on all subjects.

"Virginia, ninety-six years ago, standing upon the threshold of the new Union, pausing before she joined hands with her sister states, and pledged her faith to form a more perfect union, declared 'that among other essential rights the liberty of conscience and of the press cannot be cancelled, abridged, restrained or modified by any authority of the United States.'

"And immediately upon the formation of the Union by the ratification of the constitution, we find congress proposing, and the states ratifying among others, the first amendment to the federal constitution embodying this declaration, which was thus set in its place in the national household, where in the future, as in the past, through all coming time, let us hope it may remain sacred in the eyes of the nation.

"Virginia, as we have seen, has deeply written this principle upon her own constitutional tables of

stone, and it cannot be violated by any department of her government. But it is contended that this act does not affect the citizens of Virginia, it only affects certain officeholders, and the legislature has the right to regulate the conduct of these. These officeholders could not be such if they were not citizens. The citizens of Virginia fill her offices. And as we have no privileged classes in this state, so we have no class of citizens outside of the protection of the constitution. That the legislature may correct abuses in official conduct; that official malfeasance is liable to punishment none will deny; but there is no pretense of such in this case. The act is not entitled an act to correct official misconduct or the abuse of official station, but is entitled 'An act to prohibit the active participation in politics of certain officers of the state government.'

"If the legislature has the power to forbid the exercise of one political privilege, why may it not forbid the exercise of another? If it may forbid one of the officers of the government to speak or write according to his sentiments on public affairs, why make it not forbid the officer from voting according to his sentiments, and why may it not impose other restrictions and other disqualifications, until the officer is driven from his office because of the exercise of his constitutional privileges? The officer in question is a constitutional officer, and while he may be removed from office for malfeasance, or gross neglect of official duty, or for sufficient cause, he cannot be removed for exercising any right guaranteed to him by the con-

stitution without violating that instrument. The constitution provides the method of his removal, and the legislature cannot remove him in a different method, by creating a new offence and submitting the question of his removal to any other tribunal than that provided by the constitution, the senate of the state. Far less than the legislature, in the exercise of its general powers, declare that to be a crime, which the constitution has declared to be an inalienable right.

"It is contended that the legislature has this right, as we have said, because this citizen is an officer of the government; that the constitutional provision applies to the citizens other than officers of the government. We do not so read the constitution. These rights are guaranteed to all the citizens of the state, not to any portion or class of citizens. And because a deserving man has been honored with the confidence of his fellow-men and elevated to a position of honor and trust, is no just cause for his political degradation, but the contrary."

Louthan v. The Commonwealth, 79 Va. Rep. 196, 200-206.

II.

The Order of Discharge Being so Broad, Vague and Uncertain Deprives Petitioner of Due Process of Law.

Ordinance 580 of the County of San Bernardino, in accordance with the accepted rules of administrative law, provides for notice and a hearing before petitioner could be permanently separated from the Civil Service position in which he had the vested property right. The order of discharge constituted that notice. It constituted the information directed to the petitioner informing him of the basis upon which the County contemplated terminating his employment. However, it did not specify what act or acts on his part furnished the foundation for the discharge other than the so-called "Rialto City incident." Since this incident was decided in favor of the petitioner, it may be excluded from the court's consideration.

This leaves only the broad statement in the order of discharge that petitioner was being terminated from his employment because of the opinions expressed by him in an editorial contained in the union newspaper.

An examination of the editorial contained in the union newspaper discloses that petitioner expressed himself on a substantial variety of subjects. He expressed resentment over the high cost of living. He indicated bitterness at the second-class status of Civil Service employees. He emphasized that the need for income was no less to a Civil Service employee than it was to a person employed in private industry.

He expressed some opinions on trade unionism, and he also briefly discussed the right to engage in concerted union activities.

Respondents carefully avoided indicating what portion of the editorial was in question. Upon the conclusion of the hearing the Civil Service Commission in its Findings and Order apparently followed the lead of petitioner's employer, and in similar loose terms upheld his discharge because of the opinions expressed in the union newspaper. It is well to note that this discharge was sustained because of the expression of plural opinions in this editorial. Thus, it is apparent that the Civil Service Commission, at least, concluded that petitioner could be discharged for protesting against the high cost of living, for insisting that Civil Service employees met the same bills, ate the same food and had the same expenses as other employees; and, generally, found that each and every opinion expressed by petitioner in his editorial constituted grounds for discharge.

It is clear that both the notice which was given to petitioner and the Findings of the Civil Service Commission did not aim specifically at evils within the allowable area of state control but on the contrary swept within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech and freedom of the press.

It is not the function of the court to determine whether any single portion of the ediotrial might have offered grounds for discharge. Language prohibiting conduct that may be prohibited and conduct that may not affords no reasonable ascertainable standard of guilt, and is therefore too uncertain and vague. *Stromberg v. California*, 283 U. S. 369, 370; *Lanzetta v. New Jersey*, 306 U. S. 451; *Thornhill v. Alabama*, 310 U. S. 88, 96; *Near v. Minnesota*, 283 U. S. 697.

"Due process" envisages a plain statement to a defendant of the charges against which he must defend. The dictates of fair dealing between the state and its citizens require that when the facts are known and are the basis of a charge, there should be a complete and plain statement of those facts made before a citizen is brought to trial. The District Court of Appeal of the State of California in considering an accusation filed against a doctor stated:

> "We are not unmindful of the rule allowing great liberality in pleadings before the dental and medical boards, but giving this rule full scope, still an accusation in such a proceeding must state facts showing a violation of the particular act under which the charge is made."

The court then went on to say:

> "The complaint or accusation must be sufficient in its statement of fact to show actual unprofessional conduct by the person charged or it will not give the board power or jurisdiction to revoke respondent's license."

Bley v. Board of Dental Examiners, 120 Cal. App. 426;

Dyment v. Board of Medical Examiners, 57 Cal. App. 266.

The broad, vague charge made against petitioner herein was so indefinite in form so as to fail to give fair notice of the acts for which he was charged and deprived him of procedural due process. *Winters v. New York,* 333 U. S. 507, 509-510, 515. See also *Cline v. Frink Dairy,* 274 U. S. 445; *Cole v. Arkansas,* 338 U. S. 345, 354.

III.

The Expression by a Public Employee of His Opinion Advocating the Right to Strike for Public Employees Is Protected by the Fourteenth Amendment.

As petitioner has heretofore indicated, the order of discharge and the findings of fact and order of the Civil Service Commission interdict petitioner because of his expressions of opinion contained in the editorial. It is impossible to determine which particular part of the editorial gave rise to official disfavor.

The Department of Labor has recently designated San Bernardino County as a distressed area, much to the annoyance of the Board of Supervisors, so it is entirely possible that petitioner was discharged because of his comments about the high cost of living. If this were true, petitioner feels there is no question but that he is entitled to his immediate reinstatement. For a citizen to be punished because he complains of the high cost of living would require a general abrogation of the Constitution.

Giving the Board its due, petitioner assumes that the basis for his discharge was that portion of the union newsletter contained in the last paragraph of his editorial which reads as follows:

> "Is there an immediate, or even long range remedy, to this situation? Perhaps, but the medicine is bitter. It calls for varied applications of lawsuit, slowdown, sitdown, walkout—or that final bitter dose, the strike. Whatever antidote is prescribed it can only be attained through the media of strong unionism."

It is significant that the County of San Bernardino as employer and the Civil Service Commission as judicial tribunal both ordered the discharge of petitioner because of his expression of opinion, and both clearly avoided making any finding that the expression of opinion was any more than the abstract recommendation of strong trade unionism for municipal employees. There is no finding (and no evidence which would warrant any finding) that this statement induced anyone to do anything.

> "It is no longer open to doubt that the liberty of the press and of speech is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action. It was found impossible to conclude that this essential personal liberty of the citizen was left unprotected by the general guaranty of fundamental rights of person and property."
>
> *Near v. Minnesota,* 283 U. S. 697.

There is no question but that the "clear and present danger" doctrine is here applicable. A function of free speech under our system of government is to invite dispute. It may indeed best serve its highest purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudice and preconception and have proven unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment unless shown likely to produce a clear and present danger of a serious substantive evil

that rises far above public in convenience, annoyance or unrest.

Terminiello v. Chicago, 337 U. S. 1, 4;
Schenck v. United States, 249 U. S. 47, 52;
Abrams v. United States, 250 U. S. 616, 630.

Moreover, the likelihood, however great, that a substantive evil will result cannot alone justify a restriction upon freedom of speech or press. The evil itself must be "substantial."

Whitney v. California, 274 U. S. 357, 374;
Schneider v. State, 308 U. S. 147, 161;
Cantwell v. Connecticut, 310 U. S. 96;
Thornhill v. Alabama, 310 U. S. 88, 104-105;
Jones v. Opelika, 319 U. S. 103.

> "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of eminence extremely high before utterances can be punished."
>
> *Bridges v. California*, 314 U. S. 252, 261.

Lest it be forgotten, the First Amendment is not limited to opinions which are orthodox or even correct. One of the prerogatives of American citizenship is the right to criticize public men and measures, which means not only informed and responsible criticism, but the freedom to speak foolishly and without moderation.

Baumgartner v. United States, 322 U. S. 665.

As your honorable court has heretofore said in numerous cases, there exists a very definite line between advocacy of an abstract doctrine and advocacy of ac-

tion. The distinction between advocacy of abstract doctrine and advocacy promoting the unlawful action is one that has been consistently recognized beginning with *Fox v. Washington*, 236 U. S. 73 and *Schenck v. United States*, *supra*. This distinction was underscored in *Gitlow v. New York*, 268 U. S. 652, wherein your honorable court said:

> "The statute does not penalize the utterance or publication of 'abstract doctrine' or academic discussion having no quality of incitement to any concrete action. . . . It is not the abstract doctrine of overthrowing organized government by unlawful means which is denounced by the statute, but the advocacy of action for the accomplishment of that purpose."

In your latest decision upon the subject, your honorable court stated:

> "In failing to distinguish between advocacy of forceable overthrow as an abstract doctrine and advocacy of action to that end, the District Court appears to have been led astray by the holding in *Dennis* that advocacy of violent action to be taken at some future time was enough. It seems to have considered that, since 'Inciting' speech is usually thought of as something calculated to induce immediate action, and since Dennis held advocacy of action for future overthrow sufficient, this meant that advocacy, irrespective of its tendency to generate action is punishable, providing only that it is uttered with a specific intent to accomplish overthrow. In other words, the District Court apparently thought that *Dennis* obliterated the traditional dividing line between advocacy of abstract doctrine and advocacy of action. * * *

"The essence of the *Dennis* holding was that indoctrination of a group in preparation for future violent action as well as exhortation to immediate action, by advocacy found to be directed to 'action for the accomplishment' of forcible overthrow, to violence 'as a rule or principle of action,' and employing 'language of incitement,' is not constitutionally protected when the group is of sufficient size and cohesiveness, is sufficiently oriented towards action, and other circumstances are such as reasonably to justify apprehension that action will occur. This is quite a different thing from the view of the District Court here that mere doctrinal justification of forcible overthrow, if engaged in with the intent to accomplish overthrow, is punishable *per se* under the Smith Act. That sort of advocacy, even though uttered with the hope that it may ultimately lead to violent revolution, is too remote from concrete action to be regarded as the kind of indoctrination condemned in *Dennis*. As one of the concurring opinions in *Dennis* put it: 'Throughout our decisions there has recurred a distinction between the statement of an idea which may prompt its hearers to take unlawful action, and advocacy that such action be taken.' There is nothing in *Dennis* which makes that historic distinction obsolete."

Yates v. United States, 354 U. S. 298, 320, 321.

Is there anything in the statement of opinion by petitioner which is of such a moving nature that the words in and of themselves can be expected to cause an illegal action in the imminent future? The most that can be abstracted from petitioner's expression of opinion is

a contention that public employees have the right to strike.

Such a contention is not in and of itself so heinous as to warrant the immediate discharge of petitioner. It is significant that the Supreme Court of the State of California at about the same time that it was preparing to deny petitioner's request for hearing was holding that the right to strike existed in public employees as well as in other employees if statutory authority was given. (*Los Angeles Metropolitan Transit Authority v. Brotherhood of Railroad Trainmen*, 54 Cal. 2d 684.)

In fact, your honorable court has heretofore held that public employees of the State of California under certain circumstances had the right to strike against the state or a state agency. For, as your honorable court pointed out in a case involving the California Belt Railroad, a direct instrumentality of the State of California:

> "Under the Railway Labor Act, not only did the employees of the Belt Railroad have a federally protected right to bargain collectively with their employer but the terms of the collective bargaining agreement that they have negotiated with the Belt Railroad would take precedence over conflicting provisions of State Civil Service Laws."
>
> *California v. Taylor*, 353 U. S. 553.

See also:

> *Railway Employees Department v. Hanson*, 351 U. S. 225.

With the right to bargain collectively under the Railway Labor Act goes the right to strike. Therefore, it is clear that a consideration of the right to strike by

public employees does not *ipso facto* constitute those "fighting words" which would call for an immediate strike against the County of San Bernardino sufficient to warrant setting aside the First and Fourteenth Amendments to the Constitution.

Conclusion.

Dr. Chafee's words can be applied with brilliant clarity to the facts presented to your honorable court. Liberally paraphrasing the excerpts cited above, the effect of the suppression of the opinions of your petitioner extends far beyond the discharge of your petitioner. Concede for the moment that the public would suffer no serious loss if Mr. Pranger's opinions were suppressed. Consider, however, the impact upon his fellow employees who have his discharge as an object lesson. As Dr. Chafee says, "When you put the hotheads in jail, these cooler people do not get arrested—they just keep quiet. And so we lose things they could tell us which would be very advantageous for the future course of the nation." The very purpose of Civil Service is to protect the government employee from the whims of his political superiors, to give him a freedom and independence to do his job for the best interests of the people he serves rather than as a lackey of every politician. Here the effect is just to the contrary. What employee of the County of San Bernardino will now dare speak out against his overlords. If the Board of Supervisors can discharge petitioner because it does not like his expressions of opinion, is

there any reason why they cannot do the same thing to an employee who wishes to complain of graft in the county government, who wishes to complain of incompetence in the county government, or who just wishes to discuss change? Like a rock dropped into a pool, the ripples of this discharge have widespread effect. Mr. Pranger's fellow employees have learned their lesson, and will henceforth remain silent. The employees of the County of San Bernardino see the handwriting on the wall, and they too will remain silent. Employees of every public agency in the State of California having read the decison of the court below now realize that they are in truth and in fact second class citizens, and they too will remain silent. In one fell swoop one arbitrary capricious group of five persons has effectively stripped from over 50,000 people the right to dissent.

We are informed that statistically one out of every seven persons employed in the United States is an employee of a governmental agency. Unless this honorable court intervenes, one-seventh of the working public has been placed outside the protection of the Fourteenth Amendment and, in a way, outside the protection of the Thirteenth, too.

Respectfully submitted,

LEWIS GARRETT and
LIONEL RICHMAN,

By LIONEL RICHMAN,

Attorneys for Petitioner.

APPENDIX A.

Opinion of the District Court of Appeal.

In the District Court of Appeal, Fourth Appellate District State of California.

Edward Pranger, Appellant, vs. S. Wesley Break, et al., Respondents. 4 Civil No. 6307.

Filed, Nov. 21, 1960.

Appeal from a judgment of the Superior Court of San Bernardino County denying a writ of mandate. Carl B. Hilliard, Judge. Affirmed.

Lewis Garrett and Lionel Richman for Appellant.

Stanford D. Herlick, County Counsel of San Bernardino County, and Margaret J. Morris, Deputy County Counsel, for Respondents.

Petitioner and appellant Edward Pranger, a civil service employee, sought a writ of mandate in the Superior Court against respondents S. Wesley Break and members of the Board of Supervisors acting as ex officio members of the Air Pollution Control Board of San Bernardino County (hereinafter referred to as APCB) and members of the Civil Service Commission, seeking a judicial review of the administrative adjudication by the Civil Service Commission under Government Code section 11523, which Commission sustained the dismissal of appellant upon grounds of "conduct unbecoming an employee" upon certain specified grounds. The trial court upheld the action of the Civil Service Commission and denied the writ. The appeal is from this judgment.

There is no material dispute as to the facts. The case was tried in the superior court predicated on the

joint pretrial conference statement and order and exhibits listed therein. Accordingly the parties agreed, and the pretrial order indicates, that the petitioner, an employee of the APCB in the capacity of Clerk IV, was discharged from such position as of August 29, 1958. The dismissal was accomplished by means of a letter dated August 20, 1958, addressed to petitioner over the signature of the Air Pollution Control Officer, and it is conceded that the power of appointment and discharge was exclusively within the jurisdiction of such officer. This communication stated that the dismissal of petitioner was "upon direction" and order of the board of the Air Pollution Control District and such action was taken "pursuant to section 11 of Civil Service Ordinance 805." The letter further states that the dismissal was "based upon conduct unbecoming an employee as exemplified by your actions at a Rialto City Council meeting and your editorial comments . . ." Petitioner is specifically charged by the terms of this written notice of editorially espousing a philosophy "inimical to public service" and with the use of "abusive language with respect to" a newspaper publisher and reporter at a meeting of the Rialto City Council.

Under date of August 19, 1958 (the day preceding the date of the letter of dismissal), the chairman of the Board of Supervisors of San Bernardino County, acting on behalf of the board, had addressed a letter to petitioner which purported to dismiss him from his position. The reasons assigned in this letter were substantially the same as those set forth in the letter of August 20. It is conceded that this letter was ineffectual, since the board of supervisors, acting either in that capacity or as *ex officio* APCB, lacked any jurisdiction or power

to appoint or discharge subordinate employees of the Air Pollution Control District. Apparently appellant appealed to the Civil Service Commission from the order of dismissal. A lengthy hearing was had and it filed written findings on December 30, 1958 and determined (a) that the dismissal of petitioner was legally effected, and (b) that the conduct of petitioner "as exemplified by his editorial comments . . . demonstrated a lack of the essential loyalty, mature judgment, and the proper spirit of cooperation so vital to good government in this County," and constituted "cause for dismissal pursuant to the rules of the Civil Service Commission of the County of San Bernardino." It should be noted that the Commission made no specific findings with respect to charges contained in the letter of dismissal concerning petitioner's alleged conduct in appearing before the Rialto City Council, but elected to base its order on the conduct exemplified by editorial comments as authorized by petitioner and published in the County Union Employees' News Letter.

Appellant, as associate editor of that paper, which is published monthly and circulated among the County employees, wrote an editorial, in the absence of and without the consent of the chief editor, the membership or executive committee, referring to the claimed failure of the board of supervisors to increase wages of County employees to meet the claimed cost of living rise. He wrote in part:

"When the monthly accounting time inevitably rolls around, we know that we are orphans in a spiralling economic tornado. Are we in the San Bernardino County employ some sort of weird exception to recognized standards of decent living in our locale? . . . We are

fish swimming in the same economic sea as dwells the entire Southern California populace. With one exception. The majority of us have been relegated, through the Board's indifference, to play the role of *bottom fish.*

"For the first budgetary time in recent years, our Board of Supervisors has lent a deaf ear to the economic facts of life when it comes to the needs of the employees who administer the government they supposedly supervise. Our Union has appealed to them with supplication, mild agitation, and arbitration in an effort to nudge them from their 'ostrichized' head-in-the-sand attitude of 'hold the line'—to no avail.

"Is there an immediate, or even long range remedy to this situation? Perhaps, but the medicine is bitter. It calls for varied applications of lawsuit, slowdown, sitdown, walkout—or that final, bitter dose—the strike. Whatever antidote is prescribed, it can only be attained through the media of strong Unionism."

After the article appeared, the president of Local 122 accepted appellant's resignation as associate editor. The executive board, by resolution, disclaimed and disapproved the remarks concerning "slowdown, sitdown, walkout or strike . . ; which remarks were not authorized by the local and do not express its policies."

As to the Rialto City Council meeting, the transcript of evidence before the Civil Service Commission which involved the municipal policy in relation to the continuation in office of the city manager, appellant, a property owner, attended. There was a large audience present and many people, including appellant, actively and vociferously participated in the discussions. Public remarks attributable to appellant were there made, such

as "Let's throw him out of office" and "Get back on your horse and buggy and get on your route." In referring to the publishing plant of a local newspaper, he was said to have publicly remarked that it, or the reporter, was a "journalistic prostitute" or "literary prostitute". The local paper, the following day, carried the headlines and story that appellant Pranger, "County Assistant Air Pollution Control Director" or "assistant Air Pollution officer in the county", who apparently was known to many of the audience as such, publicly accused the reporter of the local newspaper of "prostituting the newspaper profession."

As to the publicity in reference to the claimed threatened strike and sitdown, appellant argues that his remarks were merely expressions of opinion in his capacity as Associate Editor of the News Letter; that the Constitutional right of free speech protects his privilege in publicly expressing such opinions, subject only to the restrictions imposed upon public employees to refrain from statements which would induce or incite other employees to engage in illegal or improper activities to the detriment of the public agency; that the effect of his editorial statements must be measured by the "clear and present danger" rule; and that the record is wholly devoid of evidence to sustain findings of conduct unbecoming a public employee. (Citing such authority as Near v. Minnesota, 283 U. S. 697; Bridges v. California, 314 U. S. 252, 261; Baumgartner v. United States, 322 U. S. 665; Cal. Const. art. 1 sec. 9; Board of Education v. Swan, 41 Cal. 2d 546.)

The issue is not the right of freedom of speech, whether petitioner had the right to make such editorial statements, or whether such statements were of the

nature which presented a clear and present danger, but the real issue is whether the publication of the statement, under the circumstances and in view of petitioner's position as a public employee in a sensitive governmental office, was, *ipso facto,* conduct unbecoming a public employee. This question is fairly well treated in Hayman v. City of Los Angeles, 17 Cal. App. 2d 674, 679 (hearing denied by the Supreme Court) where it is said:

"The right which is involved here is not that which petitioner thinks has been denied him, but is the right of respondents to exercise a reasonable supervision over city employees, to the end that proper discipline may be maintained and that activities among employees be not allowed to disrupt or impair the public service. Such is not only the right but the duty of the city and its several departments. In the exercise of this duty, they must be allowed a wide discretion and their acts are not subject to review by the courts until they have reached the point of illegality . . . If petitioner's activities had a tendency to create dissension and unrest among the city employees and to interfere with the enforcement of reasonable rules of conduct prescribed by the Board of Public Works, it is not for the courts to declare that a dismissal based upon these facts would be without cause and therefore without authority under the charter of the city."

This portion of the Hayman decision has been cited with approval in a number of cases in this state since the rule itself was announced. See Board of Education v. Swan, *supra,* 41 Cal. 2d 546, which appears to answer petitioner's claim that the dismissal was based upon

an invasion of his right of free speech. It is there stated, at page 556:

"Nor can defendant prevail in her claim that affirmance of her dismissal infringes upon the constitutional guarantee of her freedom of speech, in that she thereby is denied the right to criticize her superiors upon pain of losing her position. (Citations.) One employed in public service does not have a constitutional right to such employment and is subject to reasonable supervision and restriction by the authorized governmental body or officer to the end that proper discipline may be maintained, and that activities among the employees may not be allowed to disrupt or impair the public service. (Citations.) Because of this dominant public interest, the exercise of such control over the public employee is not only a right but is a duty, and in the discharge thereof a wide discretion is allowed, which will not be disturbed until the point of illegality is reached."

See also the dissenting opinion in La Prade v. Department of Water & Power, 27 Cal. 2d 47, 54.

In the absence of legislative authority, public employees in general have no right to strike against the government. (City of L. A. v. Los Angeles Etc. Council, 94 Cal. App. 2d 36; Newmarker v. Regents of the Univ. of Cal., 160 Cal. App. 2d 640; Los Angeles Metropolitan Transit Authority v. Brotherhood of Railroad Trainmen, 54 A. C. 689, 692).

While appellant subsequently denied that he intended to call for a strike, or sit down, it is clear from the record that the Union News Letter editorial could reasonably be interpreted, and was so interpreted by some, as an approval of the strike or other unlawful pres-

sures to remedy the situation described in the editorial. The publication of such sentiments could reasonably be found to engender distrust in the public mind as to the loyalty and integrity of public officers and employees generally. There is no vested property right in public employment beyond the right to have statutory procedure for dismissal followed. (Redding v. City of Los Angeles, 81 Cal. App. 2d 888; Boyd v. Pendegast, 57 Cal. App. 504). The reasons for appellant's dismissal were set forth with sufficient certainty. It is not necessary that every act specified in the charges be proved. The action should be upheld if there is sufficient evidence from the whole record to support the findings. (Turner v. Civil Service Commission, 119 Cal. App. 2d 640).

The "clear and present danger" doctrine has no application to activities of public employees where the sanctions imposed are suspension or dismissal from the public service. (Hayman v. City of Los Angeles, *supra*, 17 Cal. App. 2d 674). The cases cited by appellant were not applying the "clear and present danger" doctrine to set aside a dismissal of a public employee. There is no suggestion in them that the public agency must withhold action unless there is immediate danger of other employees joining in an overt act against the governmental entity involved. In the absence of some provisions giving tenure, an officer or employee may be removed at will. (Hackler v. Ward, 105 Cal. App. 2d 615.) It is only by virtue of the Civil Service Ordinance and rules adopted pursuant thereto that appellant had any right of tenure. Rule 8, section 2(f) thereof provides as a cause for removal "that the employee has been guilty of any conduct unbecoming an

officer or employee of the County." Therefore, the limit of the right to such employment is the cause stated in the rule adopted pursuant to the ordinance giving the right, and not the limit of constitutional rights guaranteed to individuals generally. While appellant had the same constitutional right to freedom of speech and press without restraint by governmental authority as persons generally, as a public employee he could be held accountable if such action constituted conduct unbecoming a public employee. The commission's finding that appellant's conduct was unbecoming a County employee is supported by substantial evidence. No abuse of discretion by the administrative agency appears.

As to the alleged statements made at the public hearing before the Rialto City Council, the City Service Commission did not make a direct finding on the charge. In view of the conclusions reached on the other charge, such finding is not necessary to support the Commission's decision on the general charge of conduct unbecoming a public employee. (Turner v. Civil Service Commission, *supra*, 119 Cal. App. 2d 640; Thompson v. City of Long Beach, 41 Cal. 2d 235; Code Civ. Proc. sec. 1094.5.) There can be no denial of the right of petitioner to participate in the public discussion during the council meeting. Neither the temperate or intemperate nature of his remarks, the wisdom or folly of the cause he advocated, nor the validity of his personal criticism or approval of the individual council members, are at issue in these proceedings. There is substantial evidence that the acts and conduct of petitioner were prominently publicized by the local newspaper which referred to him as "County Assistant Air

Pollution Control Director" or "assistant Air Pollution officer in the county." The inference which the Commission undoubtedly deduced was that the news value of the event must have been measured in part by the fact that petitioner was a public official. It is clear that such publicity described the public agency involved. This circumstance alone emphasizes the need for constant vigilance on the part of any public employee to avoid, in his private concerns, and in the conduct of his own business as a citizen, that type of conduct which may be the cause of direct criticism of the public agency by whom he is employed.

The remaining point is that appellant was not discharged by the person legally authorized to discharge him. Health and Safety Code section 24228 provides that the Air Pollution Control Board shall appoint the Air Pollution Control officer. The Air Pollution Control officer in turn shall appoint all of his assistants. In the first instance, the board of control attempted to dismiss appellant. Jurisdiction of the board to do so was submitted to the Superior Court of San Bernardino County in an independent action to determine this question and that court held that the authority to dismiss was solely vested in the Air Pollution Control officer.

Apparently there was some difference of opinion between the board and the control officer as to whether appellant should be dismissed. However, thereafter a letter was signed by the control officer stating that upon direction of the board he was ordered to notify appellant of his dismissal and he did thereby notify him of his dismissal; that this action was taken pursuant to section 11 of Civil Service Ordinance 805 and was based upon conduct unbecoming an employee as above

indicated. It was signed "George R. Bean, Air Pollution Control Officer." Shortly thereafter, Bean resigned his position. The argument appears to be that this notice was ineffective because his dismissal was in fact made by the board and was not the free and voluntary act of Bean, the control officer. His action in writing and signing the letter of dismissal may have been the result of pressures brought to bear upon him, but his concurrent resignation as Air Pollution Control officer (apparently prompted by his disagreement with the board as to the advisability of discharging petitioner supports the inference that he exercised his own personal judgment in the choice between compliance and noncompliance with the orders and directions of the board. In any event the letter of dismissal is unequivocal in stating that "I . . . do hereby notify you of your dismissal . . ." The Civil Service Commission considered this factual question and found that the dismissal was legally effected; that the act of dismissal was accomplished by the person having sole jurisdiction and authority to discharge petitioner as a civil service employee; and that his election to comply with directions or orders of the board does not alter or diminish the legal effect of his actions. The trial court also made similar findings. It has been held that the action of the removing officer is no less his act because performed at the direction of the governing body. (Brown v. Board of Police Commissioners, 2 Cal. App. 2d 245; Christie v. Lueth, 265 Wis. 326; 61 N. W. 2d 338.). It is the general rule in reference to the review of administrative proceedings under Code of Civil Procedure section 1094.5, that every presumption in favor of the administrative findings which may ordinarily be ac-

corded to such determinations of the trier of fact should be indulged to support the administrative findings on these factual matters. Up to the point where the court cannot, in good conscience, say that the administrative evidence supporting those findings and inference of fact is substantial, in that there is no reasonable relation between the facts and the findings, the court should not substitute its judgment for that of the agency, even though, had the court heard the case *de novo* it would not have reached the same findings of fact itself. (See Netterville, Administrative "Questions of Law" and the scope of Judicial Review (1956) 29 So. Cal. L. R. 434, 465; Thompson v. City of Long Beach, 41 Cal. 2d 235.) Our conclusion is that the finding of the Commission and the trial court had sufficient evidentiary support. No abuse of discretion appears.

Judgment affirmed.

Griffin, *P. J.*

We concur:

Shepard, *J.*

McMurray, *J. Pro tem.*

APPENDIX B.

District Court of Appeal of the State of California, in and for the Fourth Appellate District.

Edward Pranger, Plaintiff and Appellant, vs. S. Wesley Break, et al., Defendants and Respondents. 4 Civil No. 6307.

By the Court:

Defendant and appellant in the above entitled cause having filed through his attorney a record herein a notice of petition to the Supreme Court of the United States for a Writ of Certiorari and request that the original record in said cause be certified and transmitted to the Supreme Court of the United States, and it appearing that this is a proper case in which to apply the provisions of Rule 12(4) of the Revised Rules of the Supreme Court of the United States, it is hereby ordered that the entire original record on appeal be forwarded to the Clerk of the Supreme Court of the United States for inspection by said Court.

It is further directed that after the original record has served its purpose in the Supreme Court of the United States, the Clerk of said Court return the original record to the Clerk of the District Court of Appeal, Fourth Appellate District, State of California, at 106 Sixth Street, San Bernardino, California.

Dated February 1961.

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IN THE

Supreme Court of the United States

October Term, 1960
No. 913

EDWARD PRANGER,

Petitioner,

vs.

S. WESLEY BREAK, *et al.*

On Petition for Writ of Certiorari to the District Court of Appeal of the State of California, Fourth Appellate District.

Brief Amicus Curiae of the American Civil Liberties Union of Southern California.

The Interest of Amicus Curiae.

This brief is being filed by the American Civil Liberties Union of Southern California, pursuant to Rule 42(1) of this Court, with the consent of the parties, in support of the petition for writ of certiorari.

An analysis of the Record herein has brought *amicus curiae* to the conclusion that the discharge of petitioner invaded freedom of the press, as guaranteed by the First Amendment to the United States Constitution as absorbed in the Fourteenth Amendment, and that the action of respondents is so serious an abridgment of so precious a right as to warrant review by this Court.

ARGUMENT.

I.

The Discharge of Petitioner Violates the Freedom of the Press Guarantee of the First Amendment as Incorporated in the Fourteenth, and Also Offends Against Procedural Due Process Under the Fourteenth Amendment.

This case involves the basic right of free political criticism and protest by an ordinary functionary in one of our state civil service systems. Such outspokenness provoked a species of high-handed reprisal by the hiring authority against the dissenter which by threatening his status, employment rights, and future subsistence evinced certainly all the repressive impact of the ordinary penal sanction. Hence, though it is barren to quibble over the apt characterization of certain official deprivation—*i.e.*, whether technically constituting punishment for juridical purposes—from the pragmatic standpoint of the administrator in achieving ideological conformity on the issues of local, and eminently "practical" politics, that really determine the quality and level of his "bargaining" opposition among the myraid officeholders; the weapon of termination of tenure of an offending malcontent leaves nothing to be desired in its stringency. Unquestionably the particular issues forming the matrix of this dispute, cut deep economically and lie close to the central concerns of the governing officials and personnel managers. But all this description concedes is that the utterances sought to be protected were challenging and meaningful rather than trivial and banal, which of course is characteristic of any advocacy or political expression that succeeds in goading officialdom into retaliating by the infliction of

job loss, demotion, or withdrawal of the customary perquisites or emoluments.

Clearly some federal constitutional protection of minority political rights of aggrieved state civil servants must be available under the provenance of the Fourteenth Amendment. Though the retention of public office is not under the American view analogous to a vested property interest in the sense that its deprivation need be attended with all the historic safeguards implicit in "due process," yet this Court has more than once announced that rights stemming from public hire, in all reaches of American government, cannot be arbitrarily or discriminatorily impaired or abrogated. (*United Public Workers v. Mitchell*, 330 U. S. 75. Any order of removal or infliction of status change suffered at the hands of the hiring agency or its surrogate must, in last analysis, be grounded on the existence of a rational nexus between the continued special hazard, burden or inconvenience of incumbency and the well-recognized and established goals of public service. In order not to do violence to sacred human rights under the Fourteenth Amendment, disabilities officially visited on our public servants must pass muster as being functionally defensible in the most comprehensive view one can adopt of the end objectives of any progressively organized corps of public administration. Such edicts curtailing an individual employee's position, welfare, or relative standing in governmental employment can never endure judicial scrutiny if in actuality the product of caprice, racial bigotry, or the inflamed spleen of some nettled superior. We have been authoritatively advised that dismissals from the civil service solely on the basis

that persons were Jews, Catholics, or of any particular pigmentation would quickly be found wanting both in constitutional equal protection and procedural due process. (*Wieman v. Updegraff*, 344 U. S. 183.) The present instance of punitive dismissal based on the aggrieved employee's espousal of certain techniques of organized labor as a desirable means of dramatizing the sorry economic lot of the County civil servants, clamors for some definition of the protected sphere of political and organized worker activity that the hiring governmental body must respect. So far, abysmally few cases—proceeding on a wholly civil libertarian plane—have essayed, in the discharge cases, to carve out any such ambit of constitutionally inviolate proselyting or organizational promotion. Aside from the perennially active and pervasive loyalty-oath controversies and the few federal appellate cases appraising the validity of the procedural machinery and criteria for "security" dismissals and transfers, there is a dearth of federal constitutional decisional literature on what restrictions and inhibitions may rightly be imposed on civil servants, generally, respecting their support and open sponsorship of unionism among the government clerks and the bargaining devices legitimately useable against those persons and agencies within the same sovereignty vested with the power of decision over the questions of wage scales and conditions of labor. What traditional-type pressures and agitation borrowed from the industrial sector can be validly adopted? Certainly in the absence of any broad legislative proscription of strikes against civic or public bodies or agencies, the question in California remains open and merits the most intense

and protracted consideration. (*Cf. M. T. A. v. Brotherhood of Railroad Trainmen*, 54 Cal. 2d 684, 355 P. 2d 905; with *Hayman v. Los Angeles*, 17 Cal. App. 2d 674, 62 P. 2d 1047.)

Certainly mere cantankerousness and contentiousness expressed in a wholly proper forum—such as in the employees' newsletter made use of herein—will hardly suffice to justify any sanction nor will other personal idosyncrasies bearing no genuine relation to the "efficiency and probity" of public service. On the other hand, it is an open question whether it is realistic to urge transplanting of the exacting and essentially criminal-law type demands of the venerable "clear and present danger" test to the administrative determination of the limits of employee advocacy and free speech. Granted that a civil servant has in no sense been stripped or automatically divested of all the usual cluster of constitutional rights of protest enjoyed by the private citizen, by what touchstone do we determine when a particular public employee has by his militancy in behalf of normal American union behavioral patterns overstepped the bounds of propriety imposed by his uniquely sensitive position in society, and posed sufficient risk of dissension and loss of morale amongst his body of fellow-workers to warrant his removal or other form of discipline? If it be conceded that these persons dependent solely on public institutions and governmental agencies for their livelihood—comprising, we know, a fairly substantial percentage of the country's total labor force—carry over into their public careers any meaningful vestige of First Amendment protection, then their utterances about matters related to their economic

plight and measures appropriate to its solution must be accorded a large measure of tolerance, no matter how inflammatory and pernicious these views may seem to officialdom.

Petitioner herein had a serious grievance against the Board of Supervisors, who, *ex officio,* comprised his immediate employing body, the Air Pollution Control Board. He was alarmed at the prevailing wage scale established by the Board and gravely disappointed that, for the first time in recent years, the Board had failed to increase wages of County employees to meet the cost of living increase. The marked disparity that abounded in all segments of private employment as to adequacy of recompense and that begrudged to his fellow-workers under the current wage policy set by the Board of Supervisors seemed utterly lacking in justice, equal sacrifice, and budgetary need. Feeling the need of initiating or at least proposing some form of group employee remonstrance against this invidious-seeming discrimination and gratuitous hardship, he made use of the best and only forum and sounding-board open to him: the editorial page of the San Bernardino County Union Employee newsletter of which he was associate editor. The views he advanced in this publication were as follows:

> ". . . we are orphans in a spiralling economic tornado.
>
> For the first time in recent years, our Board of Supervisors has lent a deaf ear to the economic facts of life, at least when it comes to the need of the employees who administer the government they supposedly supervise.

> Is there a remedy to this situation? Perhaps, but the medicine is bitter. It calls for varied applications of lawsuit, slowdown, sitdown, walkout —or that final bitter dose: the strike. Whatever antidote is prescribed, it can only be attained through the media of strong unionism." (Opinion of the Court below, p. 4, Appendix to Petition.)

Petitioner's status was that of a Clerk IV in the County Civil Service, having attained the assumed security of permanent tenure.*. Hence, he was entitled to have certain procedural rights accorded him in any official challenge made to his continued fitness to serve. One of these, that would seem to have been neglected in petitioner's case, with, in view of the "free speech" precedent an unfortunate after-effect of mass restraint on protected expression, was the right to specificity and particularization of charge and findings by the Civil Service Commission: a precise pin-pointing of the "philosophy" and attitudes that were administratively determined "to demonstrate a lack of the essential loyalty, mature judgment, and the proper spirit of cooperation so vital to good government in this County." (Opinion of Dec. 30, 1958 of the Civil Service Commission of San Bernardino County.) The formal ground for dismissal invoked by the Board of Supervisors and sustained by both the Civil Service Commission and the District Court of Appeal was that of "conduct unbecoming an employee." (Rule 8, §2(f).) The vacuous generality of this accusation was lent some

*In this respect, his status was that of Nelson (not Globe) [*Nelson v. County of Los Angeles*, 362 U. S. 1], and Slochower [*Slochower v. Board of Higher Education*, 350 U. S. 1].

content, albeit of a multifarious nature, in the discharge letter of August 21, 1958, as stemming from (a) petitioner's comportment at a Rialto City Council meeting and (b) the "philosophy" expressed in the above-quoted editorial. As to the latter ground, no further specification was ever vouchsafed to petitioner as to which of the several independent rhetorical assertions made in the subject editorial was deemed "inimical to public service". By a close reading of the affirming opinion of the District Court of Appeal it is evident that the implied advocacy of the right of civil servants to strike was the unpalatable constituent of the published statement, though there is no warrant whatsoever in the Civil Service Commission record for isolating this particular idea. Ground (a) relating to supposed improprieties committed at the Rialto City Council meeting was disregarded by the Commission in its final opinon and was considered inessential to judgment by the District Court of Appeal. Neither the County Civil Service Commission nor the reviewing courts detected any conceivable infringement of petitioner's civil liberties by virtue of the discharge but both tribunals couched the dispositive question in terms of the quality of judgment and sense of group loyalty displayed by petitioner "as a public employee in a sensitive governmental office. . . ." By citing and quoting extensively from an earlier discharge appeal, the California District Court of Appeal elucidated beyond peradventure of doubt the policy rationale it felt legitimated petitioner's removal. "Petitioner's activities had a tendency to create dissention and unrest among the county employees and to interfere with the enforcement of reasonable rules of conduct. . . ." *(Hayman v. City of Los*

Angeles, 17 Cal. App. 2d 674, 62 P. 2d 1047). The District Court of Appeal explicitly disavows awareness of a freedom of speech issue, and disclaims any obligation to explore the attending circumstances of the publication and the contextual impact of the writing to ascertain whether the risk to governmental efficiency and morale was truly imminent and substantial enough to justify the drastic curtailment of expression that necessarily occurred. It waives aside any defense contention that the editorial discussion was merely doctrinaire, or that an intent to exhort fellow-workers to such discountenanced tactics was never seriously entertained. To the District Court of Appeal, the petitioner's language was sufficiently interpretable as a personal approval of resort to the drastic remedy described, and this permissible impression of the article "could reasonably be found to engender distrust in the public mind as to the loyalty and integrity of public officers and employees generally."

The profound and far-reaching question which seeks ultimate and authoritative resolution here is whether a civil servant may, with impunity, in publicly proclaiming his considered viewpoints on the solution of problems common to his class of workers, utter the same sort of disturbing, unpopular, even shocking ideas which are traditionally accorded constitutional protection with reference to the threatened imposition of penal or other sanctions. On the other hand, must he studiously avoid in his political or group activity every potentially controversial or "impolitic" area of discourse, no matter how deeply engrained his sentiments. Free speech of the latter variety is so attenuated and

diffident that one hesitates to assimilate it in any way to the virile breed of the First Amendment: if utterances by a public employee must on all burning topics be so anemic and guarded, better to acknowledge that public life exacts a forfeit in certain important realms of public debate of the normal and salutary protections for personal expression and advocacy. Is the interest in an outward facade of unctuous conformity and regimentation so weighty as to demand the relegation to inferior citizenship of all those coming on the public payroll?

Conclusion.

The Court, by the grant of certiorari herein, should give answers to the profound and far reaching question raised by the petition.

Respectfully submitted,

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WARREN P. HILL,
Of Counsel.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1961

No. 913

PEOPLE,

Petitioner,

v.

[illegible] BRUNO, et al.,

Respondents.

On Petition for Writ of Certiorari to the District Court of Appeal of the State of California, Fourth Appellate District

RESPONDENTS' BRIEF

STANFORD D. HEDECK,

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Attorneys for Respondents.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1961

No. 913

EDWARD PRANGER,

Petitioner,

vs.

S. WESLEY BREAK, et al.,

On Petition for Writ of Certiorari to the District Court of Appeal of the State of California, Fourth Appellate District

RESPONDENTS' BRIEF

QUESTIONS PRESENTED FOR REVIEW

In Petitioner's Statement of Questions presented for Review, three abstract questions are set forth. Petitioner has failed to express any question in the terms and circumstances of the case.

When so expressed it becomes apparent that no substantial constitutional questions are presented.

I. Does the discharge of a public employee pursuant to Civil Service rules, for conduct unbecoming a County employee in calling for a strike against the

governmental agency, violate freedom of speech or freedom of press as protected by the Federal Constitution?

II. Does the discharge of a public employee who was accorded a full hearing in accordance with Civil Service Rules violate procedural due process under the 14th Amendment?

STATEMENT OF THE CASE

The facts of the case as found by the trial Court are as follows:

Respondents S. Wesley Break, Magda Lawson, Paul J. Young, Nancy E. Smith and Daniel D. Mikesell, were at all relevant times the duly elected and acting members of the Board of Supervisors, County of San Bernardino. Prior to the happening of the events herein, the said Board had established an Air Pollution Control District pursuant to Health and Safety Code 24198 to 24212, inclusive, and the members of the Board of Supervisors were at all relevant times acting as ex-officio members of the Air Pollution Control Board of said District.

At all times there existed a system of Civil Service in the County of San Bernardino.

Prior to August 20, 1958, George R. Bean was the duly appointed and acting Air Pollution Control Officer, and petitioner was employed by said District as a Clerk IV and was paid therefor the sum of $327.00 per month.

The petitioner was dismissed by the Air Pollution Control Officer, the appointing authority of the Air Pollution Control District, by the letter of August 20, 1958, addressed to petitioner and signed by the Air Pollution Control Officer. (Cl. Tr. p. 17.)

In petitioner's description of the record and statement of facts, petitioner has so confused factual material with irrelevant argument that we digress briefly to point out that respondent has never contended that petitioner's dismissal was effected by the letter of August 19, 1958 signed by S. Wesley Break, as chairman of the Board of Supervisors. Further, the action taken by the Air Pollution Control Board and by the Board of Supervisors on August 20, 1958, at 9:30 A.M. and 10:00 A.M., respectively, was not and did not purport to be action discharging petitioner. The minutes of these meetings show clearly that the action was for the purpose of directing the Air Pollution Control Officer to perform his duty by dismissing petitioner. (Plaintiff's Exhibits 4 and 5.)

Following the dismissal on August 20, 1958, by the Air Pollution Control Officer, petitioner filed his appeal and the matter regularly and duly came before respondent Civil Service Commission for hearing.

The Civil Service Commission on December 30, 1958, by findings and order duly entered after a full hearing, determined (a) that the dismissal of petitioner was legally effected, and (b) that the conduct of petitioner, as exemplified by his editorial comment, demonstrated a lack of essential loyalty, mature judgment and the proper spirit of cooperation so vital to

good government in the County, and constituted conduct unbecoming a public employee and constituted cause for dismissal pursuant to the Rules of the Civil Service Commission of the County of San Bernardino.

Upon trial of this action the Court below found that:

1. Petitioner was legally discharged by the Air Pollution Control Officer.

2. The findings of the Civil Service Commission were supported by substantial evidence, and that,

3. The dismissal of petitioner and the action of the Commission in affirming such dismissal did not deprive petitioner of any right of free speech or of any right protected by the Constitution of the State of California or of the United States. (Cl. Tr. p. 48.)

Judgment was entered for respondents and affirmed by the District Court of Appeal (186 A.C.A. 605). A petition for hearing by the Supreme Court of the State of California was denied on January 18, 1961.

ARGUMENT

I. THE DISCHARGE OF PETITIONER PURSUANT TO CIVIL SERVICE RULES FOR CONDUCT UNBECOMING A PUBLIC EMPLOYEE PRESENTS NO ISSUE OF FREE SPEECH OR FREE PRESS, PROTECTED BY THE FEDERAL CONSTITUTION.

Petitioner has sought, by dividing his contentions concerning the constitutional right of free speach and

press into two parts, to isolate one phrase contained in the order of discharge from all other circumstances comprising the case.

Petitioner was discharged for conduct unbecoming a public employee. That the conduct involved the use of the media of the press does not *ipso facto* render petitioner immune from accountability for irresponsible conduct.

Freedom of speech does not comprehend the right to speak on any subject at any time.

> *American Communications Association v. Douds*, 339 U.S. 924.

> "The character of every act depends upon the the circumstances in which it is done."
> *Schenk v. U. S.*, 249 U.S. 47.

Thus, the philosophy expressed in the editorial which was found to be inimical to public service and as such to constitute conduct unbecoming a public employee, is found in the circumstances of the case not to be an abstract philosophical advocacy of the right to strike as argued by petitioner; but a philosophy of immediate unlawful action to remedy an existing situation.

While petitioner subsequently denied that he intended to call for a strike, it is clear from the record that the Union Newsletter editorial could reasonably be interpreted as such. Taken in context the advocacy of the strike and other unlawful pressures

could only be viewed as approval of such methods as an immediate instrument of policy to be applied by the employees. (C.S.C. Tr. (2), pp. 185-186.)

It was so susceptible to this interpretation that the president of the County Employees' Union issued a retraction, and the Union, acting through its Executive Board, unanimously adopted a resolution repudiating the methods advanced in the editorial. (C.S.C. Tr. (2), pp. 119, 133, 136.)

The real issue, therefore, which was presented to the California Courts and decided adversely to petitioner, is whether in the light of all the facts revealed upon a full hearing, the conduct of petitioner in calling for illegal action as an immediate remedy for an existing situation may reasonably be held to constitute conduct unbecoming a public employee.

That the action advocated by petitioner would have been unlawful is not open to question.

In the absence of legislative authorization, public employees have no right to strike against the government.

Metropolitan Transit Auth. v. Brotherhood of Railroad Trainmen, 54 Cal. 2d 684;

City of Los Angeles v. Los Angeles Building & Constr. Trades Council, et al., 94 Cal. App. 2d 36;

Newmarker v. Regents of Univ. of Cal., 160 Cal. App. 2d 640.

Laws affecting labor-management relations generally have no application to government unless expressly made applicable.

U. S. v. United Mineworkers of America, 330 U.S. 258, 270;

International Union U.A.W., A.F. of L. v. Wisconsin Empl. Relations Board, 336 U.S. 245, 259.

Petitioner is well aware that no law exists giving these employees the right to negotiate the terms of their employment.

The Charter of San Bernardino County Article 2½ provides that the number, compensation, powers, duties and qualifications of County employees shall be prescribed and regulated by the Board of Supervisors of the County.

The Civil Service Ordinance enacted by the Board of Supervisors pursuant to the County Charter prescribes the method for selection and discharge of such employees. The Board has not delegated to any group of individuals its right to fix compensation or other terms of employment.

In citing a recent California Supreme Court case to the effect that public employees may be given the right to strike by statute, petitioner has ignored the fact that in so holding the Court was careful to preserve the principle that in the absence of such authority no such right exists.

Los Angeles Metropolitan Transit Authority v. Brotherhood of Railroad Trainmen, 54 Cal. 2d 684, 687.

It follows from an examination of the circumstances surrounding petitioner's dismissal that the issue here is not the limits of the right of free speech as petitioner contends; but is rather, to what extent public employment may be regulated without violating constitutional guarantees.

The rights of free speech and free press are not absolute, but are subject to proper regulations.

In the area of public employment, the Courts have uniformly held that such employment frequently entails a necessary surrender of certain rights which such employees would otherwise be free to enjoy as private citizens.

Beilan v. Board of Education of Philadelphia, 357 U.S. 399;

Garner v. Board of Public Works, 341 U.S. 716;

United Public Workers of America (C.I.O.) v. Mitchell, 330 U.S. 75;

City of Los Angeles v. Los Angeles Building & Construction Trades Council, et al., 94 Cal. App. 2d 36.

This Court has on numerous occasions approved the principle that as a condition of such employment a citizen may be required to comply with reasonable, lawful and nondiscriminatory terms laid down by the proper authority.

Slochower v. Board of Education of New York, 350 U.S. 551;

Adler v. Board of Education, 342 U.S. 485.

The "clear and present danger" doctrine has no application to activities of public employees where the sanctions imposed are suspension or dismissal from public service.

A government's right to protect the public service is not constitutionally dependent upon the existence of a public emergency.

Lerner v. Casey, 357 U.S. 468.

Under the principles established by this Court, the issue presented by petitioner's discharge is whether there is a rational relationship between the standard of conduct required and the governmental interest to be protected. If such relationship exists the issue of free speech is not involved.

> "So long as such restrictions and regulations are not arbitrary and bear a reasonable relation to legitimate ends to be attained . . . no question as to their constitutionality can arise."
>
> *United Public Workers of America (C.I.O.) v. Mitchell*, 330 U.S. 75.

That respondents had a legitimate interest in protecting the public service from activities having a tendency to create dissension and unrest among employees is clear. That petitioner's conduct could reasonably be found to have such tendency is equally clear.

The detrimental effect of such activity by public servants has been recognized by Congress. Pursuant to 5 U.S.C.A. 118 p. (3), (4); no person shall accept or hold employment in the government of the United

States or any agency thereof who participates in any strike or asserts the right to strike against the government of the United States or agency thereof.

Similar prohibitions by State and local governments have been sustained by Courts the country over as being a reasonable exercise of governmental authority over the public service.

National Labor Relations Board v. Jones and Laughlin Steel Corp., 154 F. 2d 932;

Perez v. Board of Police Commissioners, 78 Cal. App. 2d 638;

City of Jackson v. McLeod, 199 Miss. 676, Cert. Den. 328 U.S. 863;

Fraternal Order of Police v. Harris, 306 Mich. 68.

While reasonable men may differ as to the necessity for such regulation, it cannot fairly be said that there is no rational relationship between the standard of conduct required by respondents and the governmental interest which it is their duty to protect.

II. THE DISCHARGE OF PETITIONER WHO WAS ACCORDED A FULL HEARING PURSUANT TO CIVIL SERVICE PROCEDURES TENDERS NO ISSUE OF DUE PROCESS UNDER THE 14TH AMENDMENT.

In petitioner's Statement of Questions presented for Review, the second question raises a fictional issue not encompassed in the real issues involved in petitioner's discharge. There was no failure to specify the particular wrongful act.

Respondents contend that the reasons for petitioner's dismissal were set forth with sufficient certainty.

Petitioner was charged with two specific acts constituting conduct unbecoming a public employee. The order of discharge set forth the ground as stated in the Civil Service Rules. The dates and places of such conduct were specified in the order of discharge. The fact that petitioner may have made other statements and committed other acts at the same time does not render the order vague and uncertain.

In cases depending upon civil sanctions only for enforcement, it is sufficient if the language is such as to fairly apprise men of common intelligence of the charges against them.

In support of his contention that the charge was uncertain, petitioner relies upon the standard of certainty required in statutes involving criminal sanctions.

The distinction is clearly defined in the cases cited by petitioner.

> *Winters v. New York*, 333 U.S. 507, 515 ("The standards of certainty in statutes punishing for offenses is higher than those depending primarily upon civil sanctions for enforcement.");
>
> *Cole v. Arkansas*, 338 U.S. 345.

It is apparent from the record that petitioner was fully aware of the nature of the acts for which he was discharged. (C.S.C. Tr. (2), p. 172.)

There is no allegation in the petition, and the record does not disclose any request, that a more particular statement of the charges against petitioner be furnished. (C.S.C. Tr. (2), p. 6.)

Petitioner was accorded a full hearing at which he clearly demonstrated knowledge of the nature of the charges against him.

The Courts have repeatedly upheld dismissal proceedings founded upon charges less specific than those herein proffered.

Beilan v. Board of Education of Philadelphia, 357 U.S. 399 (incompetency);

Neuwald v. Brock, 12 Cal. 2d 662 (language of Commission's rule held sufficient);

Board of Education of City of Los Angeles v. Swan, 41 Cal. 2d 546 (unprofessional conduct);

Goldsmith v. Board of Education, 66 Cal. App. 157 (unprofessional conduct);

Boyd v. Pendergast, 57 Cal. App. 504 (neglect of duty was held sufficient without setting out the acts making up the delinquency charge);

Enright v. Williams, 116 Cal. App. 360 (misconduct and violation of Commission's Rules and Regulations held sufficient).

CONCLUSION

It is apparent from petitioner's argument in this case that petitioner conceives Civil Service Laws as functioning only for the limited purpose of granting employees tenure of office. Having served this purpose, petitioner would have you believe that the employee relationship then escapes completely from the control of the governmental agency involved.

This is implicit in petitioner's contention that the State or other governmental agency must be subject to the same constitutional limitations when dealing with its own employees, that it is when dealing with persons in their private capacity.

To contend that the governmental agency may create an office or employment; may give permanent status to the occupant of such office, but cannot establish and maintain reasonable standards of conduct for such employees, is to ignore the ultimate purpose of Civil Service which is to promote the efficiency and integrity of the public service.

Such contention also ignores the great body of law both statutory and decisional, relating to the proper control and supervision of public employees.

There is nothing new in the issues involved in this case except petitioner's novel theory that a governmental agency by the mere act of adopting a Civil Service Ordinance thereby loses its right to prescribe the standards of conduct of its employees. Such theory is supported only by numerous quotations wrenched from context and relevancy, and is contrary

to the principle repeatedly stated by this Court and by Courts the country over that a government may constitutionally require that its employees comply with reasonable and nondiscriminatory terms of employment.

Respondents submit that the decision of the District Court of Appeal is consistent with the principles of due process so carefully carved out by this Court in innumerable decisions affecting the rights and responsibilities of public employees.

Wherefore, respondents pray that the application for writ of certiorari be denied.

Dated, San Bernardino, California,
June 7, 1961.

Respectfully submitted,

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